Where Principle and Pragmatic Meet: The World of UNHCR’s Protection Work

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There is a natural complementarity between the protection and solutions mandate of the United Nations High Commissioner for Refugees (UNHCR) and the international system for the protection of human rights. Protection operates within a structure of individual rights and duties and state responsibilities. Human rights law is a prime source of existing refugee law protection principles. At the same time, it increasingly serves to complement them. The entire

1 This paper was originally prepared for and delivered as a lecture at the Venice Academy of Human Rights on 17 July 2012, as part of the summer program of lectures on “The Limits of Human Rights”, organized together with the European Inter-University Centre for Human Rights and Democratisation.

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refugee experience, from forcible displacement, through the search for asylum, to securing a durable solution, is in fact one barometer of the respect accorded to basic human rights principles worldwide. The evolution has been quite negative over recent times, with many States decreasingly prepared to make their asylum systems, where such exist, as accessible and as adequate as hitherto. This can be attributed to several causes, including the magnitude of displacements, their often protracted nature, the levels of national and regional insecurity they can generate; as well as what are perceived to be seriously onerous financial, political, environmental and social costs of maintaining large refugee populations, or receiving continuous arrivals.

Maintenance of asylum space is increasingly dependent on refugee protection activities, which do not compromise a State’s concerns about national security in the present international context of proliferating trans-national crime and terrorism. The blurred distinctions
made in countries, not only in the north, but also in the south, between refugees and other irregular migrants has further eroded the consensus on the need to maintain generous asylum regimes. These problems as states assess them have to be accommodated in the protection and solutions strategies of UNHCR. They are as much a part of the framework in which the agency must deliver on its mandate as are the human rights of its beneficiaries. There are both clear complementarities, but also differences between the refugee-specific mandate of UNHCR and the mandates of other human rights organs and mechanisms. There is a need to maintain the mutually supportive, but separate, character of respective mandates. This is particularly in light of the narrowing of asylum space and the fact that the margins are wide for an aggressive sovereignty to reassert itself in the policies and practices of states. The health of the institution of asylum is dependent on the proper balance of principles and pragmatism.
Forced displacement remains one of the most visible and profound consequences of persecution, other human rights abuses and armed conflict. Millions are trapped in spiraling cycles of violence, deprivation and displacement inside their countries, while many of those able to flee and seek asylum find themselves in long-term camp exile. There are also an increasing number of refugees and IDPs seeking support and assistance in urban areas, not camps.

The scope of such displacement is enormous, which is proving a huge challenge for the limited resources, outreach assistance and protection capacities of the aid organisations and shows no signs of abating. Of the world’s 42.5 million displaced, 25.9 million people - 10.4 million refugees and 15.5 million IDPs -

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3 The statistics provided date from 2011, the last year comprehensively available at the time of publication. Statistics with respect to Syrian refugees date from early March, 2013.
were receiving protection or assistance from UNHCR at the beginning of 2012. It does not include the almost 5 million Palestinian refugees assisted by the United Nations Relief and Works Agency [UNRWA]. The early months of 2013 saw, on average, some 2500 refugees a day crossing out of Syria into Jordan. The Syrian crisis had by March displaced over one million people externally in the region, and an estimated number of more than two million internally displaced persons. Fighting in 2012 in Northern Mali at its height caused almost 319,000 to cross borders. In the first months of 2013, 25,000 persons swelled the numbers of refugees from the Central African Republic fleeing the rebel advance and coup d’état of March. Inter-ethnic violence in the Rakhine State in Myanmar provoked a high level of internal displacement throughout 2012 and renewed

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5 The one million mark was reached 5 March, 2013. Over 400,000 Syrians became refugees in January and February 2013 alone.
departures in significant numbers. The UN has estimated that by January 2013 there were some 115,000 IDPs and over 275,000 Rohingya asylum seekers and refugees hosted in countries in S.E. Asia and Bangladesh.

As a general rule, more than 80% of refugees are hosted within their own region, often in countries struggling to meet the needs of their own citizens. The asylum countries among the top 10 might at first glance appear to be the more unlikely. Pakistan was host to the largest number of refugees worldwide (1.7 million), followed by the Islamic Republic of Iran (887,000) and the Syrian Arab Republic (755,400; government estimate).\(^6\) On average, one out of four refugees in the world originated from Afghanistan.\(^7\)

If most refugees remain in their regions, the numbers who do not are nevertheless on the rise. In


\(^7\) ibid at 15.
2012, an estimated 479,300 asylum applications were registered in the 44 industrialized countries. This represents an increase of 8% over 2011 and is the second highest level [with 2003 witnessing the highest] in the past decade.\(^8\) Some 7.1 million people are living in ‘protracted’ exile.\(^9\) In Pakistan, Kenya and Eastern Sudan, for example, there are tens of thousands of Afghan, Somali and Eritrean refugee children, respectively, whose grandparents were the last family members to see their home country. Over 10,000 children have been born to Somali refugees in Dadaab Camp, Kenya, who themselves were born in the camp.

Just a decade ago, an average of 1,000,000 refugees returned home each year with the help of UNHCR. This number has dropped by 80% as continued

\(^8\) UNHCR Asylum Trends 2012 – Levels and Trends in Industrialized Countries.
insecurity or lack of livelihoods discourages return.\textsuperscript{10} 2011 saw the third lowest number of voluntarily repatriated refugees in a decade. Numbers continued to decline in 2012. At the same time, solutions other than returning home remain equally elusive. Developing countries, facing their own economic and social challenges, are reluctant to offer refugees local integration. Despite a growing number of industrialized countries that admit refugees through organized resettlement programs, the number of places available each year accommodates less than 1\% of the global refugee population.

Despite the continued massive number of refugees, in recent years IDPs have emerged as the largest group of people receiving UNHCR’s protection and assistance - as many as 15.5 million in 26 countries at the end of 2011, though the total number of IDPs from

\textsuperscript{10} ibid at 18.
conflict could be as high as 26.4 million.\textsuperscript{11} Then there are the additional populations of concern. They include a conservatively estimated 12 million stateless people, and people displaced by natural disasters and environmental factors.\textsuperscript{12}

Displacement triggered or reinforced by factors such as natural disasters, desertification, population growth, rapid urbanization, food insecurity, water scarcity, and violence related to organized crime has become a phenomenon of growing concern. The number of people displaced by natural disasters has multiplied in recent years, exceeding the number displaced by conflict. Climate change often exacerbates these other drivers of displacement and could increase this number by many

millions in decades ahead. Moreover, it recognizes no borders.\textsuperscript{13}

\textbf{The factual context}

These realities have led to an international refugee protection system under considerable pressure. True, many states, especially in the developing world, continue to keep their borders open to refugees, accompanied by acts of extraordinary generosity from host populations directly affected by the arrival of refugees. However, it is also a fact that a disturbing number of people do not enjoy the rights which international refugee and human rights law formally guarantees them.

There are contextual reasons which explain, if not justify this. Affected host states are mostly countries struggling to meet the needs of their own citizens. They do have genuine concerns about protracted stay which

\footnote{\textsuperscript{13} Global Trends 2011 (n 4) at 5.}
can provoke community unrest, lead to environmental damage and exacerbate local and regional insecurities. This is very much the case when camps lose their civilian character and play host to militants and their families.\textsuperscript{14} Protracted refugee situations are not the high-profile and strategically important operations preferred by donors, and hence are almost invariably neglected and underfunded.\textsuperscript{15} More often than not, refugees find themselves in remote, isolated and seriously underdeveloped areas, with limits placed on their freedom of movement and other rights, including access to work, and where livelihood opportunities [for both exiled populations and citizens alike] are scant.\textsuperscript{16} In many cases, security is precarious, education for children is rudimentary and support structures for the traumatised

\textsuperscript{16} ibid 115.
are absent. Such circumstances breed their own protection problems, including anti-social youth behaviour, exploitative employment, illicit livelihoods activities, prostitution, militia recruitment and irregular onward migration. Gender-based violence has become an endemic feature not only of the conflict itself, but also of its aftermath in refugee camps and settlements.\(^{17}\) If the international community has been aware of this for quite some years, programs to prevent and address it are still very uneven. Support to victims is inadequate and their access to justice is limited, in tandem with a high level of impunity for the perpetrators.

In the developed world, access to basic rights can also be rather relative. It is characterized by countries with divergent approaches, inconsistent practices, and barriers to accessing safety. There are several factors which lead to these restrictions on rights. Developments over recent years have placed a strain on the

\(^{17}\) ibid.
sophisticated protection systems put in place in Europe, North America and Australasia. Providing asylum has proved sometimes very costly, in monetary and other terms. Population displacement is a humanitarian, but also, with terrorism and transnational crime on the rise, a serious political and security concern for these states. With irregular arrivals increasingly viewed through a security prism in many parts of the world, borders have become a particularly shadowy place, with interception, turn-arounds and *refoulement* taking place often outside the frame of proper scrutiny.\(^\text{18}\) Detention, periodically arbitrary and often of children, is prevalent, with possibilities to challenge this through, for example, *habeas corpus* or judicial review not always provided.\(^\text{19}\) The result is that asylum seekers, many of whom are or may be refugees, can find themselves in a sort of legal

\(^{18}\) Address by Ms. Erika Feller: Counter-Terrorism Committee.


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limbo where protection of their legal rights take second place to harsh migration controls. In some countries there are fewer safeguards regulating resort to, or the conditions of, detention of migrants and asylum-seekers than that of criminals.

Stateless people fall into a particular human rights void. The International Covenant on Civil and Political Rights (ICCPR), as the Human Rights Committee has recognized, stipulates that with few exceptions human rights are ‘not limited to citizens of States parties but must be available to all individuals, regardless of nationality or whether stateless… who find themselves in the territory or subject to the jurisdiction of the State party’. 20 The reality is, though, very different from the theory. Stateless people have been termed ‘the ultimate forgotten people’. A stateless person is someone who has no national identity or legal personality in his or

her country of residence. For the millions of stateless people around the world, no nationality means identity documents conferring legal personality and the rights that go with this – access to health care, education, property rights, freedom to leave and return to your country – are simply not available. Births may not be registered. There may even be anonymity in death, with a recognised civic funeral not possible. In many ways these people simply do not exist.21

UNHCR and human rights

(a) Refugee problems are human rights problems

In the words of Mary Robinson, the former High Commissioner for Human Rights, ‘the admission of asylum seekers, their treatment and the granting of a

refugee status are, themselves, crucial elements of the international system of protection of human rights.”22 UNHCR’s Executive Committee of the High Commissioner’s Programme (ExCom) has noted, in fact on a number of occasions, the ‘multifaceted linkages between refugee issues and human rights’23 as well as ‘the obligation to treat asylum-seekers and refugees in accordance with applicable human rights and refugee law standards, as set out in relevant international instruments’.24

The refugee problem is quintessentially an issue of rights – of rights which have been violated and of resulting rights, set out in international law, which have to be respected. A refugee, classically defined, is a

persecuted person, denied her security of person, unable to exercise in safety her right to freedom of expression, to freedom of association, to freedom of belief, to pursue her political convictions, or just even to be who she is born to be. More broadly defined, a refugee is also someone unable to continue to live in safety where he is, due to the discriminate or even indiscriminate dangers of war or serious civil disturbance.25

The rights at issue here are human rights of the fully classical sort. Refugees are, though, also entitled to benefit from a regime of rights and responsibilities specific to their predicament. The conventions making up the Bill of Rights were drafted for the norm – a world of nation states and their citizens. In the case of a refugee, the link between the individual and the formally

responsible nation state has, at least temporarily, been severed. In practical terms this means no Embassy to rely upon, no identity documents available, and no guaranteed access to judicial and social protection mechanisms citizens will take for granted. Flight and external displacement effectively ‘de-citizenise’ people. They need a rights-based surrogate protection which international law, international institutions and third countries have been making available for over 60 years now.\textsuperscript{26}

\textbf{(b) The 1951 Refugee Convention: a human rights text}

The Universal Declaration of Human Rights, Article 14 (1) calls for respect for the right of an individual to seek and enjoy asylum from persecution. Yet, no clear content had been given internationally to the notion of asylum

\textsuperscript{26} ibid.
until, in the wake of two world wars and resulting mass displacements, the 1951 Convention relating to the Status of Refugees was adopted. With Nauru in 2011, 147 States are currently parties to the Convention and/or its 1967 Protocol. Together these instruments incorporate, either directly or by way of interpretation, the special rights attaching to refugees, which include:

- The right not to be returned to persecution or the threat of persecution (the principle of *non-refoulement*).

- The right not to be discriminated against in the grant of refugee protection.

- The right not to be penalised solely for having entered into or being illegally in the country where asylum is sought, given that persons escaping persecution cannot be expected to always leave their country and enter another in a regular manner.
The right not to be expelled, except in specified, exceptional circumstances to protect national security or public order.

The right to minimum and articulated conditions of stay.

The Convention regime also incorporates in its Preamble some foundation concepts that must frame the grant of protection. The Preamble takes particular cognisance of the fact that ‘the United Nations has manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms’. The Preamble also recognises that refugee protection is to be considered social and humanitarian in nature, so that its conferral should not become a cause of tension between states. Moreover, it accepts that the grant of asylum may place unduly heavy burdens on certain countries, with a satisfactory solution to the problem of refugees only
achievable through international co-operation.²⁷ By virtue of the Final Act of the Conference of Plenipotentiaries, the Convention’s framework is also predicated on acceptance of the principle of family unity and the need to facilitate refugee travel, among other issues.²⁸

(c) UNHCR is a human rights agency

A system of rights has scant chance, in today’s world, of reaching its full effectiveness unless it is backed, in one form or another, by an oversight or implementation body. The 1951 Convention was one of the first of the human rights instruments, post-war, negotiated in an era when oversight of a state’s action for and on behalf of its

²⁷ Preamble, Convention Relating to the Status of Refugees 1954, 189 UNTS 137.
own, or others’, citizens was still in its early stages. UNHCR was an early if partial attempt to put in place a treaty supervision arrangement outside the framework of oversight between and among the States parties themselves.

UNHCR was established on December 14th, 1950, just a few weeks after signature of the European Convention on Human Rights, and two years after the proclamation of the Universal Declaration of Human Rights.29 Being an integral member of the family of the United Nations - an institution whose charter and leadership commits all member states and organizations to foster and work to realize human rights globally, UNHCR is a human rights agency. It is, however, one with a particular mandate.

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UNHCR has a specific mandate from the General Assembly to extend international protection to refugees and to work with States to find lasting solutions.\textsuperscript{30} The mandate is set out in its Statute which, among other provisions, has general directives as to how UNHCR might deliver upon both responsibilities. These are directed at formal restoration of basic rights, as well as the creation of an enabling environment so that these rights have a reasonable chance of being enjoyed.

**Operationalising human rights: challenges of adequacy, appropriateness, efficacy and protection outcomes**

**(a) Adequacy of the legal tools**

The rights at the base of refugee protection cannot be viewed in isolation of the broader framework in which

they must be actualised. This is a context of nation states, their sovereign prerogatives, and their national interests and responsibilities which are not always coherent and compatible. UNHCR has long understood the importance of promoting convergence and accommodation between the legitimate interests of states and their international responsibilities to protect refugees. Here, the 1951 Refugee Convention is still a highly valuable, but imperfect tool.

If the Convention is clear in terms of the rights, it is close to silent about which States’ responsibility it actually is to protect these rights in any given case. It rests on concepts of burden and responsibility-sharing, but without sufficient guidance, definitions or indicators to help make this real. It takes an approach to protection which has individuals at its centre, when many situations now involve mass arrivals. It was drafted in an era before many of the forms of persecution witnessed today had even a name, much less attracted global recognition,
such as ethnic cleansing or gender crimes, and certainly before there was the plethora we see today of non-state actors, like paramilitaries or gangs, also creating significant forced displacement.

When should a state party to the Convention be required to provide for the rights to which an asylum seeker or refugee is entitled; when is another state the more appropriate provider; what are the criteria for determining when responsibilities are engaged and when they can be refused; what forms of human rights violations engage the refugee protection responsibilities of states? The answers to these and other related questions are only partially to be found in the legal instruments.

It is perhaps interesting to illustrate some of the dilemmas confronting application of the Convention through a case study constructed on the basis of real situations. Let us take the typical case of a woman who is outside her home country, fears serious consequences
for her physical security should she return and who arrives in a foreign country in an ‘irregular’ manner. She seeks to be allowed to present her claim for protection and have it processed. From an international refugee law and human rights perspective, her mode of travel, the legality of her entry, or even the differing situations of other groups of migrants that may have arrived alongside with her, should not limit her right in this regard. It is her right to have access to and present her claim before effective protection mechanisms.

Yet does the state to which she presents her claim for protection have itself to accept it? What if she is a victim of trafficking and her fear is of social ostracism and local revenge as much as of State persecution? What if she has fled not individualised persecution, but generalised violence? What if she passed through other countries on the way? What if she has come directly, but there is another country to which, while she personally has no links, persons of her nationality are regularly
admitted, for example on the basis of a Treaty of Peace
and Friendship? What if a part of her own country seems
to be at peace?

The fact is that each or all of these considerations
may well have legal consequences that create
insurmountable obstacles to accessing the protection she
may well need - that is, assuming she is able to navigate
all the entry hurdles in the first place. She may have to
confront an asylum reception system dominated by
political and public distrust. Particularly if she
arrives outside of a regular visa-entry regime, she may be
labeled as a ‘queue-jumper’, ‘bogus asylum seeker‘, a
woman with links to illegal human trafficking, classified
as a prostitute, an economic migrant or at best a victim
of a criminal migration racket, and therefore, by
definition, not by decision, someone outside the frame of
any asylum procedures.

So in our example, we have a woman who may
well be a refugee, and who at a minimum is someone
with the right to have her situation properly adjudicated. But we have, too, a number of complicating factors, revolving around notions of agents of persecution, secondary movement, safe country, internal flight alternative, ‘external flight alternative’, as well as the imperative of combatting smuggling and trafficking, which could quite likely lead to the woman not being able to access any protection mechanisms.

Of course a proper interpretation of the Convention, consistent with its objects and purposes, means that there has to be a provider of protection. A state is clearly in violation of its Convention obligations if, by its own actions, a situation is created whereby protection is not available. But gaps and ambiguities in the Convention framework and its concepts unfortunately help those so inclined to interpret away their responsibilities in specific situations.

When is a gap a gap? If the international protection regime rests on the 1951 Convention, at the
regional level other instruments come into play which extend the scope of its application, including importantly the 1969 Organization of African Unity Convention for Africa, the 1984 Cartagena Declaration for Latin America, and the web of Directives being developed as part of the envisaged Common European Asylum System. There are also the complementary bodies of law, and in particular international human rights law and related texts. Refugee law academic Guy Goodwin Gill makes the point: ‘If the concept of international protection might once have been perceived as merely another form of consular or diplomatic protection, limited to one closely confined category of border crossers, today its roots are securely locked into an international law framework which is still evolving… This encompasses refugee law, human rights law, aspects of international humanitarian law, and elementary considerations of humanity’.\footnote{Goodwin-Gill, ‘High Commissioners Dialogue on Protection Challenges’, 2 December 2010.} For states that
are not party to the 1951 Convention and/or 1967 Protocol or relevant regional refugee instruments, human rights treaties may provide one of the few sources of state obligations in relation to asylum-seekers and refugees.

The human rights instruments would certainly have an application in the example just given. Detention is one area where they have a growing relevance. It is a spreading practice, even in States counted among the earliest and most loyal supporters of UNHCR’s clients. On 24 April 2012, UNHCR released a position paper on protection for refugees and asylum-seekers in one such state, Hungary, in response to requests from governments in other European Union States who have been facing domestic legal challenges to returning asylum seekers to Hungary under Dublin II arrangements.\(^\text{32}\) Hungary was the first country in Europe

\(^{32}\) UN High Commissioner for Refugees, ‘Hungary as a country of asylum: Observations on the situation of asylum-seekers and
to ratify the Refugee Convention after the downfall of communism and hosted tens of thousands of refugees amid the breakup of Yugoslavia in and after the 1990s.\textsuperscript{33} Since 2010, new laws and policies have come into effect whereby the human rights and protection needs of asylum-seekers have been overshadowed by law enforcement objectives in the fight against illegal migration.\textsuperscript{34} Key concerns for UNHCR include the increasingly systematic detention of visa-less asylum-seekers in harsh prison-like conditions, without any differentiation.\textsuperscript{35} Typically, an asylum-seeker may be detained for the full 4-5 months of their in-merits procedure and spend much of the day locked in their rooms. The new laws also provide for the detention of families with children for up to 30 days and for

\begin{itemize}
  \item ibid at para 2.
  \item ibid at para 9.
  \item ibid at para 43.
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administrative detention up to one year.\textsuperscript{36} This is where other binding statements of rights, like minimum detention standards and the Convention on the Rights of the Child, can be of great assistance to clarify and expand the scope of protection responsibilities.

This said, this increasingly interconnected and mutually reinforcing web of international human rights and refugee law is also a more and more complicated, and sometimes contradictory, legal terrain and policy puzzle. There are, for example, complementary \textit{non-refoulement} provisions in international and regional human rights law available – under Article 3 of the 1984 UN Torture Convention, Article 6 and 7 ICCPR, mirrored in the ECHR - which serve to protect those who may have been wrongly left out of the refugee protection regime. At the same time, though, the same provisions can and sometimes do serve as a haven for persons who under the exclusion clauses of the 1951 Convention do

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\textsuperscript{36} ibid at para 45.
not merit refugee protection. Where persons who are clearly not entitled to refugee protection are nevertheless allowed to stay in countries because of the operation of human rights provisions, correct as this is according to the human rights instruments, it can erode public confidence in the institution of asylum unless clear distinctions are made.

The puzzle is further complicated by lack of clarity as to the legal reach of many rules. Some are purely optional and bind only those States which have accepted them by ratifying the relevant treaties. Some are binding in a region or some regions, but clearly not at the universal level. Some are accepted by organisations like UNHCR as mandatory, but only applied in their discretion by States. It does not help, either, that the lodging of reservations to international instruments is a widespread practice, circumscribing the level of protection able to be relied upon under a specific instrument in a specific country. Increasingly UNHCR is
trying to bring more clarity through strengthening its relationship with the judiciary, including through direct involvement by invitation or at the initiative of the agency in precedent-setting cases.

Where ‘hard law’ does not provide all the answers, UNHCR also endeavors to push the boundaries through its own standard-setting activities in the realm of ‘soft law’. The Executive Committee of UNHCR, whose membership is upwards of 80 States, is charged to advise the High Commissioner on protection matters. This advice is normally offered in the form of Conclusions on issues of doctrine and practice. Conclusions have traditionally been adopted by the Committee, by consensus, on the basis of UNHCR originated texts. If the process is somewhat grudging at the moment, it has nevertheless generated significant statements, on issues ranging from the handling of gender-related claims to proper processes for adjudicating refugee status.
(b) Appropriateness: protection through the human rights bodies

The 1951 Convention has long been recognized as a human rights instrument and international human rights norms increasingly inform the interpretation of Convention provisions, provide complementary protection to persons who may fall outside the Convention, but still need international protection or complement the standards and rights granted by the 1951 Convention. What is not so clear is how far the human rights bodies themselves can complement UNHCR’s supervisory role. UnhCR has long been reticent about too close a relationship with these bodies. While accepting that it holds much information that is pertinent to the deliberations of the human rights treaty bodies and entities like the Human Rights Council, not to mention the International Criminal Court, UNHCR is concerned about the dangers of too close links politicizing its work.

and compromising thereby its access to beneficiaries, their security, the confidentiality of their stories, and the safety of UNHCR staff on the ground. Without access and security, programs cannot be delivered in the field.

These concerns have lessened somewhat through the consolidation of the treaty monitoring system and the garnering of greater experience with cooperating together to enlarge asylum space and advocate on behalf of persons of concern. UNHCR is now making concerted efforts to strengthen its relationship with the treaty bodies, other UN human rights institutions and their special procedures, and regional bodies and courts. From information-sharing to contributions to the preparation of the General Comments on Convention articles by the treaty-based committees, the Office tries constructively to feed into their knowledge and understanding about the links between particular rights and refugee protection and to become a more predictable resource generally on refugee issues. The Universal Periodic Review (UPR)
reporting process has opened up a useful new way to talk with states on asylum and refugee issues in their countries and to reinforce protection advocacy around them. The public nature of the reports is an important part of the process of promoting accountability. It is distinct from UNHCR’s more specific engagement on the ground with governments, which is often quite confidential in nature.

Given the relatively limited expertise of Committee members on refugee law, they have responded positively to this evolving relationship, even if the extent to which states report on asylum and refugee issues varies widely. The treaty bodies are increasingly, as a result, taking on board a spectrum of displacement issues – from *refoulement* or detention, through registration and documentation difficulties, reception problems, denial of access to education, location.

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38 ibid.
healthcare, or social security, to concerns linked to refugee status determination.

The majority of the treaty bodies permit complaints or petitions to be made alleging violation of their rights by a state party. No similar mechanism exists in respect to refugee rights. This gap has led to a growth in asylum-seekers and refugees bringing claims before the human rights mechanisms, utilizing human rights non-refoulement provision comparable to Article 33 of the Refugee Convention, even if as a matter law, none of the treaty bodies have specific jurisdiction over the rights contained in the 1951 Convention. The two main types of cases regularly submitted to the treaty bodies concern the threat of return to serious risk of harm or violations of fundamental rights, as well as the prohibitions on arbitrary detention of asylum-seekers and refugees. It is also worth noting that, although the complaints procedure is remedial not preventive, early warning is a feature of the activities of some of the bodies. The
Committee on the Elimination of Racial Discrimination (CERD) for example operates an early-warning facility, with the intended purpose of helping to prevent situations escalating into conflict; it is supposed also to assist with ‘confidence-building measures to identify and support’ racial tolerance in order to prevent the resumption of conflict.\(^{39}\) The CERD has written letters in relation to refugee and displacement situations.

Despite the political nature of the Human Rights Council, there are advantages in closer cooperation. The complementarities of advocacy and capacity building through the Council and efforts to protect rights on the ground are increasingly interesting for agencies like UNHCR.\(^{40}\) The Special Procedures take their strengths from this perspective. Some of the forty odd processes specifically address displacement issues, such as the


\(^{40}\) UNHCR and Human Rights (n 1).
rights of IDPs or the crime of human trafficking, while the country mandate holders review country situations where UNHCR has large programs. The country-specific special sessions of the Council on Sri Lanka, Myanmar, Congo, Syria, OPT, Lebanon, Libya, Cote d’Ívoire and Haiti has been followed attentively by the agency and has served as a platform for further advocacy.\textsuperscript{41}

In particular, the UPR process is shaping up as a valuable new avenue through which to promote respect for refugee law principles. UNHCR’s experience with the UPR has been very positive. First, the process is a universal undertaking, allowing UNHCR to provide submissions concerning the treatment of refugees and asylum seekers in very many countries, not only those at the center of attention because of mass refugee flows. Second, as governments freely and voluntarily accept recommendations, these can be a basis for non-contentious engagement with the state in question. The

\textsuperscript{41} ibid.
‘shadow reports’ of the NGOs in the UPR process strengthen its content and directions. The review of all 193 UN member states during the first UPR cycle generated a total of 1,203 UPR recommendations, covering 153 countries, which referred explicitly to issues related to forced displacement, asylum or statelessness.\footnote{UN High Commissioner for Refugees, ‘Statement by Ms. Erika Feller, Assistant High Commissioner (Protection) High Level Segment of the 19th Session of the United Nations Human Rights Council’, 1 March 2012 available at: <http://www.unhcr.org/refworld/category,REFERENCE,,SPEECH,,4f756b802,0.html>.
} UPR is now web cast, meaning it can reach a huge audience simultaneously. The Council’s supporters hail this as a real breakthrough when it comes to holding governments accountable for what they say and do.

Having watched with marked interest the UPR process, UNHCR has sought to have the Council take up some specific rights issues affecting displaced persons, for example, difficulties for refugees to re-acquire
confiscated land, houses and property, or their problems in obtaining identity documents. The Council’s debates and advocacy around the right to a nationality, based not least on reports submitted to it on minority issues and contemporary forms of racism, have been valuable for UNHCR’s efforts to assist and protect stateless people and to campaign against xenophobia.43

All this said, clearly the Council has a way to go before it could be considered a major player in refugee protection. As a periodic process, reviewing each State once every four years, the UPR process does not have the flexibility to address issues on an urgent basis. It is also not meant for extreme situations as it does not in itself have teeth. In practice, it is less a ‘peer review’ than a ‘self-review’, and how far it will go is primarily determined by how far a country concerned allows it to go. The process is too often defeated by the ‘collusion of camaraderie’. When the Council goes beyond peer

43 ibid.
review to take up actual situations, questions still abound about the actual result on the ground. The Council works essentially through promotion and awareness-raising. When it comes to protection, it uses ‘name and shame’ devices, but it lacks implementation mechanisms and sanction possibilities. Its direct link to victims is at best tenuous, even given that for the more complex issues, there are the Special Procedures. This is an important limiting factor of such Council mechanisms for challenging operational environments.

(c) efficacy - the European Court of Human Rights as a protection tool

It is an unsettling fact that a large proportion of the caseload of the European Human Rights Court concerns asylum issues (the ‘ECtHR’). The growing volume of

44 António Guterres (UNHCR), ‘Remarks at the opening of the judicial year of the European Court of Human Rights’, 28 January 2011, available at:
requests for interim measures is a reflection of the fact that many asylum-seekers, refugees and other forcibly displaced people consider that their rights are not respected, even in States with a very long protection tradition and party to all the relevant instruments. These States struggle in particular with the claims to protection from persons who have fled their homelands because of conflict or indiscriminate violence. A narrow interpretation of the refugee definition and of Article 15(c) of the EU Qualification Directive, the instrument which defines who qualifies for refugee status or subsidiary protection in EU law, often leaves them without protection. With UNHCR’s approach to the link between refugee status and conflict-driven flight not always being respected, the ECtHR has become an effective protection ‘partner’ for the organization. Some examples will illustrate this.

<http://www.unhcr.org/refworld/category,COI,UNHCR,SPEECH,,4d6377fe2,0.html>.
On February 23, 2012, the ECtHR, based on its earlier case law on the extraterritorial application of human rights law, issued a landmark judgment in the case of *Hirsi Jamaa et al. v. Italy*. The case concerned a group of Somalis and Eritreans who in May 2009 had tried to reach Europe by boat, but had been intercepted beforehand on the High Seas by Italian coast guard and customs vessels, some thirty-five nautical miles south of the island of Lampedusa. The group was returned to their place of embarkation, Libya. The Grand Chamber of the European Court unanimously ruled that even though the applicants never reached Italian territorial waters, Italy had breached several obligations under the European Convention on Human Rights, including to protect the applicants from torture and inhuman or degrading treatment (Article 3 of the European Convention) as well as the prohibition of collective expulsion of non-

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45 *Hirsi and Others v Italy* Application No 27765/09, Merits and Just Satisfaction, 23 February 2012 (Grand Chamber).
nationals (Article 4 of Protocol No. 4 to the European Convention).

The case had particular significance for UNHCR in that it endorsed the interpretation that the principle of non-refoulement applies extraterritorially. UNHCR has long taken this position, but has not always been supported in so doing: for example, the UNHCR position contrasts with that of the U.S. Supreme Court, which held in the 1993 judgment of Sale vs. Haitian Centers Council that the prohibition of non-refoulement did not apply extraterritorially,\(^{46}\) hence legitimating the practice of the U.S. Coast Guard in intercepting Haitians outside U.S. territorial waters and repatriating them directly to Haiti.

In a climate of increasingly stringent migration control measures, the Hirsi judgment sends an important signal for the protection of the rights of so-called “boat people”. The precedent-value of the decision will likely

extend beyond the reach of the European Convention, to countries where push-back policies have become one coping mechanism for dealing with the controversies attached to boat arrivals.

As this case illustrates, the ECtHR can be, jurisprudentially and actually, an important protection partner. UNHCR has integrated this understanding into its protection strategies in Europe. For example, it supports implementing partners, local lawyers or even applicants themselves in submitting requests for interim measures under Rule 39 of the Rules of Court, which empowers the Court to put in place binding interim measures, including suspension of deportation orders.47 This provides a unique opportunity to halt the imminent expulsion of an applicant to situations amounting to \textit{refoulement} to irreparable harm contrary to the European

Convention on Human Rights. Application of Rule 39 usually concerns the right to life (Article 2) and the right not to be subjected to torture or inhuman or degrading treatment or punishment (Article 3). Exceptionally, the prohibition of slavery and forced labour (Article 4) and the prohibition on the imposition of the death penalty (Article 1 of Protocol 6 and Protocol 13) are also the subject of Rule 39 measures. The Court has even, if rarely, granted interim measures in cases where the applicants complained of unjustified interference with their family/private lives under Article 8 ECHR. Recently, the Court used Rule 39 interim measures to allow two Eritreans and one Ethiopian, stowed away on a Maltese flagged ship in Ukrainian territorial waters, to disembark and to be granted access to a lawyer and to the asylum procedure.48 In another case, the Eritrean journalist Mr. Gebremedhin turned to the Court to avoid being returned to a risk of persecution, after his asylum

48 Kebe and Others v Ukraine Application No 12552/12, Merits, 2012.
application was rejected at the French border. By virtue of the interim measures of the Court, he was admitted onto the territory and, a few months later, the authorities recognized him as a refugee in the sense of the 1951 Convention. In that case, the Rule 39 mechanism compensated for the absence of automatic suspensive effect of an appeal made in the accelerated asylum procedure at the border.

UNHCR does not itself submit Rule 39 requests so as to preserve the neutrality of the office should it appear as third party intervener before the ECtHR. The total number of Rule 39 decisions taken by the European Court of Human Rights in 2011 was 2,778, which is significant even if it constitutes a decrease in comparison with the figures from 2010 (3,680 decisions).

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49 Gebremedhin v France Application No 25389/05, Merits, 26 April 2007.
50 Jean Paul Costa (President of the European Courts of Human Rights), ‘Requests for Interim Measures’ (Statement issued by the President of the European Court of Human Rights), 28 January
The value of the Court goes beyond the prevention of *refoulement*. It has materially contributed to defining the scope of the *non-refoulement* principle, the development of procedural guarantees and basic standards of treatment.⁵¹ Again by way of example, in *Salah Sheekh v the Netherlands*,⁵² the Court set out important safeguards for the application of the so-called internal flight or relocation alternative. This concept refers to a specific area of an asylum-seeker’s country of origin where he or she is assessed to have no well-founded fear of persecution and could reasonably be expected to establish him- or herself. The safeguards developed by the Court were incorporated by the European

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⁵² *Salah Sheekh v the Netherlands* Application No 1948/04, Merits, 11 January 2007.
Commission into its proposed recast of the EU Qualification Directive.\footnote{53}

Another recent case dealt with important questions surrounding statelessness, flowing from the dissolution of the former-Yugoslavia and the erasure of the names of former citizens of Yugoslavia from the register of citizens of the then new state of Slovenia.\footnote{54} According to the Court’s ruling, the Slovenian authorities had failed to remedy comprehensively and with promptness the grave consequences for the applicants of the erasure of their names. It noted that the applicants [the ‘erased’] had been deprived of a legal status that had previously given them access to a wide range of rights – including entitlement to health insurance and pension rights - and opportunities, for instance in the sphere of employment. It held in particular that there had been a violation of Article 8


\footnotetext{54}{Kurić and Others v. Slovenia Application No 26828/06, Merits and Just Satisfaction, 26 June 2012.}
(right to respect for private and/or family life) of the European Convention on Human Rights (ECHR); a violation of Article 13 (right to an effective remedy) in combination with Article 8 ECHR; and a violation of Article 14 (prohibition of discrimination) in combination with Article 8 ECHR. Furthermore, the Court indicated to Slovenia that it should set up within one year a compensation scheme for the ‘erased’ people in Slovenia.

This case is the first case addressing issues pertaining to stateless persons in which UNHCR has intervened as a third party before the ECtHR, which was concluded with a judgment on the merits.\textsuperscript{55}

(d) Protection outcomes: rationalising rights in the field

Rights play an important role in shaping UNHCR’s interaction with its UN partners and in forging common standards for humanitarian engagement in the field. Better harmonization of programs and closer integration of activities into a ‘One UN’ agenda is currently a policy orientation of the UN system. The goal is stronger synergies between the political, security and human rights dimensions of its work, i.e between the human rights ‘generalists’, the peace and security entities and the humanitarians. This is leading, for example, to the increasing incorporation of the protection of civilians mandate into United Nations Peacekeeping missions. A UN-wide Human Rights Due Diligence Policy has been adopted, which requires all [including UNHCR] to work within policy frameworks which ensure that activities pursued [notably in the context of security and law
enforcement] are compliant with international human rights standards and norms.\textsuperscript{56}

Advocacy, capacity building and legal interventions are a central part of UNHCR’s protection work. However, the litmus test of the organisation’s effectiveness in fulfilling its protection mandate is the protection outcomes it is able to realise, in the field, for persons of concern. How different is advocating for rights and delivering on protection? To what extent is the language of rights a tool of real operability in this regard?

Rights are the anchor for the protection of refugees (and sometimes in different ways, other conflict-affected populations) in the complex political and security environments where refugee situations

develop. This is particularly the case where the interests of states and those of refugees may not coincide. Rights are a powerful advocacy tool for protection entities (including elements within governments) seeking to protect the welfare and interests of refugees. For a refugee-receiving state they can serve as a neutral, humanitarian rationale for providing asylum and responding to basic human needs. In situations where the state is under considerable pressure from a neighbouring state not to do so, there is certainly benefit to be had, for the relationship between the two states, from having an entity like UNHCR, with a fundamentally rights-based mandate, able to act as an independent, non-political guardian of refugee rights, based on international standards.

Accepting that displaced individuals and populations are rights-bearers, not just passive and

57 Thanks to UNHCR staff member Vicky Tennant for her observations from an internal mission report upon which I have drawn.
vulnerable recipients, reinforces that the organisation has an accountability to its beneficiaries that goes beyond the provision of charity. This approach is particularly pertinent when it comes to sexual and gender based violence. UNHCR has recently set in train an access to justice initiative which rests on the understanding that victims of violence are first and foremost rights bearers and subjects before the law, for whom access to justice should be an integral part of any meaningful protection interventions undertaken for sexual and gender-based violence survivors. Offices are called upon to advocate for and partner in initiatives focused on diminishing impunity, and enhancing access to justice mechanisms as well as the actual delivery of justice outcomes through these mechanisms. Justice is a broad-based concept including not only remedies for violations of rights and reparations for harm suffered, but at an earlier stage dealing with impunity through education, training and prevention activities.
Rights are a very important barometer when it comes to UNHCR’s work in countries of origin particularly in the context of return and reintegration. It is the extent to which individuals are able to exercise their rights upon return that determines the viability and sustainability of return. With this in mind UNHCR carries out protection monitoring in countries of return and regularly partners in this regard with national human rights institutions. In Afghanistan for example, UNHCR built, over a four year period, a partnership with the Afghanistan Independent Human Rights Commission. One of the key elements of the partnership was the establishment of a joint human rights monitoring and case management system, which enabled UNHCR not only to expand its geographical coverage in a country where access was a serious concern, but also to build the capacity of a national institution in a key area such as protection and human rights monitoring.
If the pursuit and defence of rights are an integral part of protection programs, it is not the rights framework alone which will ensure that meaningful protection is actually realised in practice. This is influenced by the much broader range of factors found at the intersection where politics, security, refugee community dynamics, donor priorities and international capacities meet. UNHCR has to be able to manoeuvre between all of these often competing forces. Understanding and navigating what influences how states behave in practice and what refugees actually want, not only need, is what will eventually determine whether their protection is real or in theory only.

In the first instance, this requires a fine sense of when to resort to the language of rights and responsibilities, and when to bring needs more to the fore. This may be the case, for example, when using human rights language may jeopardise the safety of persons of concern and the staff on whom they depend,
or hinder access to beneficiaries who are in dire need of assistance. Many governments view the role of human rights-mandated actors with grave suspicion. This has been exacerbated recently by the growing reach of the international criminal justice system. Accountability and humanitarian space are not always complementary. Accountability which addresses impunity is fundamental for victims and it should also serve as a disincentive to further abuse. One irony though is that what should be an added protection for victims may actually lead to their further victimization by leading to denial of access to needed humanitarian assistance. The prospect of being held accountable, in tandem perhaps with serving as a deterrent, has encouraged some governments to strictly curtail the activities of humanitarian workers, so that they are not exposed to events which might later found a criminal indictment. Some regimes are particularly suspicious of protection-mandated agencies as they see protection activities as a channel for information gathering, monitoring and reporting into accountability
mechanisms such as the international criminal tribunals. In such circumstances, how UNHCR frames its protection interventions will be particularly important to what it can actually do on the ground.

The perceptions of the beneficiary communities, not only of the host states, will be a significant influencing factor. Effective engagement on protection requires a profound understanding of how communities themselves understand protection, what their protection priorities are, and the protection mechanisms they themselves can draw upon. It is very important that the way in which UNHCR designs and implements its emergency operations does not exacerbate existing tensions and risks. This means for example that, in sensitising populations about their rights, promotion must be done in a responsible manner in a way that strengthens rather than weakens communities’ cohesiveness. Promotion activities need to be contextually sensitive and supported by the availability
of mechanisms to support the rights in practice. Protection must also be based on an understanding of why communities and individuals may choose to behave in ways that may seem counter-intuitive to external actors. Approaching protection solely from the perspective of rights and entitlements may distort the understanding of what is meaningful to refugees themselves, and what they see as critical to their security, dignity and well-being. In many emergency displacement situations, considerable numbers of refugees may opt to stay at the border. This is where they have access to grazing for their animals, the ability to cultivate their crops and keep watch over their homes and land, and to preserve the possibility of rapid return, even though relocation to camps would have offered a safer option, albeit rendering them reliant on assistance. This suggests that protection from the perspective of refugees is closely linked to a vision of a future, and preserving future coping capacities, and not just to immediate needs. It also brings up several issues such as
the management of an influx of combatants or whether refugees should be permitted to remain in host communities in border areas. In these situations, arguments based solely on rights are unlikely to succeed, unless the solution proposed is seen to be in the interests of host communities and the receiving state.

As communities are key actors in their own protection, the realisation of protection in practice is inextricably linked to community capacities. The experience of displacement can fundamentally disrupt family and community structures. An effective protection-focused emergency response must seek to preserve and restore this protection capital, *inter alia* through swift action to facilitate the restoration of community structures.

In summary, then, protection and rights are critically linked, conceptually and in their realisation, but there are fine dividing lines. Approaches that match what the principles call for and what protection demands on
the ground are required. Operationalising protection is about satisfying two linked, but different imperatives; strengthening and restoring community capacities for self-protection (or ‘protection capital’), whilst at the same time working with governments and drawing upon the framework of rights to provide a stable basis within which such community-based protection can flourish.

Conclusion: Some of the Challenges

The 1951 Refugee Convention is intended to confer a right to international protection on people who are vulnerable because they lack national protection, and to assure refugees the widest possible enjoyment of their rights. But translating this aspiration into reality remains a challenge.

This article is a very summary presentation of the difficulties for countries and for refugees trapped in large-scale displacement dramas. It is intended to
demonstrate, amongst all else, the scope and formidable nature of the challenges of survival and response – for governments and for the refugees. It serves to underline the realities – the necessity of, but the inadequacies as well - of asylum today for the large percentage of the beneficiaries and the providers. It also attempts to give a particular and telling context to the refugee principles designed to frame the management of such situations, where they are fundamental and where the gaps are, and indeed whether asylum as it is currently understood and practiced, needs to be re-visited with some urgency. This includes reviewing the applicability of the evolving doctrine of Temporary Protection.  

To keep asylum meaningful there is a need to ensure that all refugees are able to exercise their rights; that refugee protection does not depend on where an individual seeks asylum; that individual and group

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determination systems are made coherent, particularly in relation to conflicts; that governance structures for asylum are further developed to resolve tensions between states; and that UNHCR continues to serve as both a partner and a watchdog for individual states and the international community on matters of asylum.

Rights are at the origin and are the goal of all UNHCR does. However resorting to the language of rights, employing the human rights institutions and even analyzing and responding to needs through the lens of human rights may not always, alone, lead to the best protection outcomes. Action in support of refugees is essentially humanitarian, and has to be able to rely on confidence-building and neutrality, which can make the difference when it comes to access to beneficiaries, success or failure of interventions on their behalf, and the security of agency staff. Finding the most optimal balance between the principles which must set the framework and the pragmatism which must also guide
actual programming is the singular challenge for humanitarian action in today’s world.